FILED
SID J. WHITE
JUL 22 1993
CLERK, SUPREME COURT
By________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CARLOS SANTOS,

Appellant,

v.

Case No. 79,860

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

As to Issue I: Although the trial judge, and the state, maintain that under the facts of this particular case the state proved beyond a reasonable doubt the existence of the cold, calculated and premeditated aggravating factor, should this Court hold otherwise relief should still not be afforded to appellant. Where the trial judge expressly stated in his order that he would have imposed the death penalty even without the existence of this particular aggravating factor, any error is harmless beyond a reasonable doubt.

As to Issue II: The trial court did not err by failing to find the existence of the two "mental health" statutory mitigating factors under the facts of this case. The trial judge examined the record and reviewed the evidence to support his finding that these mitigators were not proven. The opinions of appellant's mental health experts were refuted by the other testimony which was adduced at trial.

As to Issue III: The state submits that the failure to find the no significant history of prior criminal activity as a mitigating factor in this cause, if error, was harmless beyond a reasonable doubt. The facts of the instant case and the severity of the contemporaneous crimes along with the strong jury recommendation of death sentences renders any error by the trial court harmless.

As to Issue IV: The sentences of death imposed in the instant case for the multiple homicides are proportionally

warranted. The multiple homicides when coupled with the weak mitigation set this defendant apart from the norm of capital defendants.

As to Issue V: There was no objection to purportedly improper jury instruction and, hence, there is no cognizable claim on appeal based upon the purported instruction on and finding of the prior violent felony aggravating factor. In any event, this Court's precedent makes it clear that the murder of multiple victims supports a finding by the trial judge of the prior violent felony aggravating factor.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY FINDING THAT THE HOMICIDES COMMITTED BY APPELLANT WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION AND, IF SO, WHETHER THE HARMLESS ERROR DOCTRINE APPLIES SO AS TO SUSTAIN THE SENTENCES OF DEATH IMPOSED BY THE TRIAL COURT.

Your appellee does not contest the fact that in the original direct appeal of this cause, Santos v. State, 591 So. 2d 160 (Fla. 1991), a majority of this Honorable Court determined that the cold, calculated, and premeditated aggravating factor was not properly found because, although "calculated", the murders were not "cold" so as to sustain the application of the factor. This Court relied upon the fact that the murders arose in a "domestic" setting consistent with a crime of heated passion. On remand, the trial judge apparently believed that he was permitted to reconsider whether the evidence established a finding of the cold, calculated, and premeditated aggravating factor because the remand was for a resentencing hearing (R 38).[1] Indeed, the trial judge apparently believed that he could re-examine the record and determine whether additional matters of evidence supported

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[1] References to the record on appeal presently at bar which consists of one volume will be referred to by the symbol "R" followed by the appropriate page number. References to the original record on appeal used in case number 74,467 will be referred to by the symbol "OR" followed by the appropriate page number.

evidence supported application of the cold and calculated factor inasmuch as two justices had endorsed the notion that the factor was present even based upon those matters discussed by the trial judge in his original sentencing order.

In his sentencing order upon remand, the trial judge found with respect to the application of the cold, calculated, and premeditated aggravating factor the following:

* * *

> The appellate court found the murders not to be "cold" because they were committed in the course of a heated domestic dispute. This case does involve people who formerly lived together and who had a child together. However, the factors do not support Santos' argument that this was an irrational, heated act of passion. Santos went to Irma's home two days before the murders, threatened her, and showed her the gun he had obtained. He repeated his actions the next day. Not deterred by the police order to stay away, he searched for her on the third day and shot Irma and Deidre at point blank range.
>
> These actions were clearly calculated and premeditated. Additionally, these actions were "cold". These murders were not the result of some sudden fit of heated rage. Santos repeatedly threatened to kill the victims and, then, acting with great deliberation, he carried out his threats.
>
> The evidence showed that after Santos killed Irma and Deidre he left the scene and called a taxi. The taxi driver testified that Santos seemed sweaty but calm after the murders. When he was arrested, the testimony reflects that he was still calm and relaxed. These are not the reactions of a man swept up in a rage of passion.
>
> While Santos' emotional distress over his domestic situation can be considered in mitigation, the facts as occurred in this case are not consistent with an irrational killing with no heightened premeditation. His domestic situation was not a heated rage

> and does not provide any moral justification for the killing of Irma or for the killing of the 22-month-old baby.
>
> (R 52 - 53)

Thus, the trial judge relied on matters in evidence to show that the defendant's actions were not the result of a heated domestic confrontation, but rather were coldly and premeditatedly planned for several days prior to the commissions of the homicides. The trial court found, and the state submits, that the facts of this case reveal a careful plan of one who wished to execute his victims. The facts do not evidence a person who, because of an uncontrollable mental disease, reacts impulsively and commits a crime. Indeed, although Santos' "motivation may have been grounded in passion, it is clear that he contemplated this murder well in advance." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). The trial court's finding in the instant case parallels several decisions of this court wherein the cold, calculated and premeditated aggravating factor was upheld in "domestic situations." A significant factor in those cases appears to be not whether the homicides are "domestic" but rather whether the method employed by the defendant fit the definition of this factor. The trial court's analysis and findings comports with cases decided by this Honorable Court, e.g., Klokoc v. State, 589 So. 2d 219 (Fla. 1991); Porter v. State, supra; Zeigler v. State, 580 So. 2d 127 (Fla. 1991); Brown v. State, 565 So. 2d 304 (Fla. 1990). In Klokoc, the defendant killed his nineteen year old daughter in order to spite his estranged wife. In Porter the

defendant murdered his former lover and her male companion. In Zeigler, the defendant killed his wife as well as her parents and another male. In Brown, the defendant killed the daughter of his female live-in companion. These "domestic" settings did not preclude this Honorable Court from finding the applicability of the cold, calculated and premeditated aggravating factor. In each of these cases, as in the instant case, the defendant committed the murders in the manner described by *Florida Statute 921.141(5)(i)*. In the instant case, the trial judge found that the evidence adduced at trial supported the proposition, beyond a reasonable doubt, that appellant committed these crimes in a cold manner and not in a heated fit of passion.

Appellant also suggests that he had a pretense of legal or moral justification when he committed the murders of his female companion and his infant child. No "pretense" is even suggested by these facts. Even if appellant had reason to believe that Irma, the mother of his child, was going to leave him, there is no justification for lashing out and committing murder. This is not a case such as those where a defendant is afraid of his victim, where a victim attacked the defendant previously and threatened the defendant's life, or where a victim jumped at the defendant. In the instant case, the defendant does not have a colorable claim of any kind of moral or legal justification where he was upset that his female companion might leave him. Society does not recognize a license to kill because one is upset. Indeed, not only was there no pretense of justification, but the

facts of the instant case amply show that this was a cold, calculated act and not one committed in a fit of rage. Had appellant acted in a fit of rage, he would not have attempted to also kill Irma's son. But for a misfiring weapon, appellant would have committed three murders in the instant case. Thus, appellant's contention in his brief that the infant child was killed merely because she was in her mother's arms is totally belied by the fact that appellant attempted to kill another child at the same time. The state submits that the facts of the instant case support the finding that the homicides were committed in a cold, calculated and premeditated fashion without a pretense of moral or legal justification.

In his brief, appellant relies upon the "law of the case" doctrine, and upon double jeopardy principles and contends that the trial court was not permitted to revisit the cold and calculated aggravating factor.[2] Even should this Honorable Court determine that the trial court improperly revisited the question of the applicability of the cold and calculated aggravating factor, your appellee respectfully submits that any error is harmless beyond a reasonable doubt. In his order the trial court specifically noted that "after carefully weighing each

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[2] It is interesting to observe that appellant feels compelled to urge the application of the "law of the case" doctrine with respect to the instant issue, yet appellant argues under Issue V, <u>infra</u>, a matter which was previously determined by this Court in its original opinion.

aggravating factor both individually and then collectively against the nonstatutory mitigating factors, this Court finds that either individually or when combined, the aggravating factors far outweigh the mitigating factors" (emphasis supplied). Thus, "[i]f there is no likelihood of a different sentence, the error must be deemed harmless." Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). Therefore, where the trial judge has specifically stated that a death sentence would be appropriate based upon a weighing of one aggravating factor against the weak mitigation, any error in finding the cold, calculated and premeditated aggravating factor is harmless beyond a reasonable doubt.

ISSUE II

> WHETHER THE TRIAL COURT ERRED BY FINDING THAT THE TWO "MENTAL HEALTH" STATUTORY MITIGATING FACTORS WERE NOT ESTABLISHED BY THE GREATER WEIGHT OF THE EVIDENCE.

As his second point on appeal, appellant contends that the trial court purportedly ignored "unrefuted and uncontroverted" testimony which established the presence of the two "mental health" mitigating factors. In its original opinion in this cause, this Court stated that "on its face, this evidence suggests that two statutory mitigating factors may be present." The trial court, however, examined the evidence presented at trial and specifically determined that the testimony of eyewitnesses refuted the testimony of the mental health experts:

> During the penalty phase the defense presented the testimony of two mental experts who had examined Santos after the murders; whereas, the State's evidence on these issues was provided by the numerous eyewitnesses who testified during the guilt phase. The evidence as to whether Santos was under the influence of extreme mental or emotional disturbance and whether Santos was substantially impaired in his capacity to conform his conduct to the requirements of the law overlaps; therefore, these will considered together.
>
> The defense experts examined Santos several months after the murders occurred and stated that Santos refused to admit the killings had occurred when they examined Santos, his behavior was extreme, and he exhibited bizarre and agitated behavior. In fact, Santos was declared incompetent to stand trial creating a delay of the trial until the following year. Dr. Ainsworth stated that Santos' emotional make-up was such that he had a tendency to go into a psychotic condition when under great stress. Since Santos stated he did not remember the

murders, the experts testified that it was "likely" that Santos' emotional state was at the same level of extreme agitation when the killings occurred. Additionally, Dr. Kremper testified that Santos' did have an impaired ability to conform his conduct to the requirements of the law.

These claims are <u>refuted</u> by the numerous eyewitnesses who saw Santos' actions. In advance of the killings, Santos acquired a gun and used it to intimidate Irma and her children. During the two days prior to the killings, Santos did not display any outward evidence of any extreme mental or emotional disturbance. Before the murders, Santos threatened Irma and Deidre, but he was able to adapt his behavior when the police arrived. The day of the killings Santos called a taxi to take him around town while he looked for Irma. After the shootings, Santos entered a convenience store and asked to use their telephone. When he was refused, he evidently called for the taxi on the outside phone since the taxi was told to pick-up a fare at the store. Santos, then, hid behind the store until the cab began pulling away. Santos even had the presence of mind to create a story to explain why he was behind the store. While in the cab, Santos attempted to hide the gun under the seat. When the gun was found, it had two empty chambers and there live shells in it. Also, two live rounds were found on the floorboard of the taxi. Since the gun was a five-shot .38 pistol, Santos had partially reloaded the gun since the shootings. When Santos was arrested, his actions were described as calm and relaxed.

Based upon these facts this Court, using the first part of the *Rogers* test, finds that these factors are not proven by the greater weight of the evidence. *See Sochor v. State, 580* So. 2d 595 (Fla. 1991). Santos' actions up through the day of the murders do not reflect a person under the influence of extreme mental or emotional disturbance or who was substantially impaired in his capacity to conform his conduct to the requirements of the law. His behavior during this period was

> entirely different than that seen by the mental experts.

(R 53 - 55; emphasis supplied)

The trial court's findings are supported by the record. "It is within the trial court's province to decide whether a mitigating circumstance is proven and the weight to be given it." Teffeteller v. State, 439 So. 2d 840, 846 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984).

There is simply no requirement that a trial judge must accept the testimony of an expert witness. Although appellant's mental health experts may have testified that the mental mitigators were present, the trial court properly rejected these findings. The trial court as finder of fact in determining the existence of mitigating factors is entitled to draw this conclusion. "Expert testimony . . . is not binding on the trier of fact even when that testimony is uncontradicted." Cronin v. State, 470 So. 2d 802, 804 (4th DCA 1985). The trial court thoroughly analyzed the circumstances surrounding appellant's conduct and determined that appellant exhibited such behavior as to warrant the rejection of the mental health experts' conclusion. The trial court's analysis is well-supported by the record and should not be disturbed by this Honorable Court on appeal. Indeed, the instant case is similar to the situation presented in Lucas v. State, 613 So. 2d 408 (Fla. 1992). In Lucas, this Court observed that the trial judge conscientiously reviewed each proposed mitigator in light of the facts and in a

lengthy footnote discussed how the facts of the case contradicted the conclusions reached by the mental health experts. Id. at 410. This Court then reiterated that "[i]t is within the trial court's discretion to decide whether a mitigator has been established, and the court's decision will not be reversed merely because an appellant reaches a different conclusion", citing Sireci v. State, 587 So. 2d 450 (Fla. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992). This Court also cited Campbell v. State, 571 So. 2d 415 (Fla. 1990), for the proposition that the existence of a mitigating factor is a question of fact which will be upheld if supported by the record. Id. As in Lucas, the trial judge in the instant case has determined that the mental health mitigators have not been proven by the greater weight of the evidence and where that conclusion is supported by the record, this Honorable Court should not find otherwise. Merely because appellant wishes to reinterpret the facts to fit his expert witnesses' opinions of the events does not compel the conclusion that the trial court's findings are incorrect. Rather, as in Lucas, the trial court validly observed that Santos' behavior simply did not conform with the image created by the mental health experts. Appellant's second point must fail.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND THE NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY A MITIGATING FACTOR.

In the instant case, the trial judge apparently did not find the statutory mitigating factor of no significant history of prior criminal activity. In his order, the trial judge did not, as he did with four other statutory mitigators, expressly state that the prior criminal history mitigator was "not applicable" (R 53). Yet, it does not appear from this record that the trial judge found the no significant prior criminal history a mitigator to be present in this case.

This Honorable Court in Scull v. State, 533 So. 2d 1137 (Fla. 1988), indicated that a history of prior criminal conduct cannot be established by contemporaneous crimes. Accord, Bello v. State, 547 So. 2d 914 (Fla. 1989). In Scull, this Court held that although it is within the discretion of the trial judge to find this particular mitigating factor, that discretion may be abused where there is no prior criminal history. Your appellee submits that in the instant case, however, the trial court's discretion was not abused by not finding this mitigating factor. The contemporaneous crimes involved in the instant case were multiple murders and an attempted murder. These are serious crimes and it may well be within the discretion of the trial judge to determine that the mitigating factor does not exist or, at the very least, that the weight to be accorded the mitigator should be significantly diminished.

In the instant case, the jury recommended sentences of death under both first degree murder counts by 10 - 2 majorities (OR 1190, 1192), whereas in Bello a bare 7 - 5 majority recommended one sentence of death. Your appellee submits that the facts of the instant case and the severity of the contemporaneous crimes along with the strong jury recommendation of death sentences renders any error by the trial court harmless beyond a reasonable doubt.

ISSUE IV

WHETHER THE DEATH SENTENCES IMPOSED IN THE INSTANT CASE ARE PROPORTIONALLY WARRANTED.

Appellant argues that the sentences of death imposed in the instant case were not proportionate to other death cases because his moral culpability is simply not great enough to deserve a sentence of death. He contends that the shootings, though tragic, simply arise from a domestic situation thereby precluding a sentence of death. Appellant points to several cases where this Honorable Court has reduced sentences of death to a life sentence where the murders were the result of a "passionate obsession." E.g., Garron v. State, 528 So. 2d 353 (Fla. 1988); Irizarry v. State, 496 So. 2d 822 (Fla. 1986); Wilson v. State, 493 So. 2d 1019 (Fla. 1986).

Your appellee contends that the sentences of death were properly imposed in the instant case as the murders were such as to set Santos and his killings apart from the average capital defendant. The imposition of the death sentences were proportionate to other capital cases where the sentence has been upheld. Cf. Brown v. State, 473 So. 2d 1260 (Fla. 1985).

The jury recommended in the instant case that appellant received death sentences for the two murders by votes of 10 - 2. The trial court found the existence of two aggravating circumstances and, in mitigation, the court found that Santos had lived in an abusive environment as a child and that Santos was in a domestic situation with the victims (R 55 - 56). Based upon

these factors, the sentences of death were proportionate to other death cases and the lower court did not err in imposing both sentences of death. Appellant's reliance on cases such as Garron, Irizarry, and Wilson is misplaced. In each of those cases, this Honorable Court found that the killings were the result of heated, domestic confrontation and, although premeditated, were most likely committed upon reflection of a short duration. The murders in the instant case were not the result of a sudden reflection, as acknowledged by this Court where it observed that many previous threats had been made by Santos, but rather were the result of a plan formulated over a period of time sufficient to accord reflection and contemplation of the defendant's actions. The instant case is more akin to cases such as Porter v. State, 564 So. 2d 1060, 1064 - 1065 (Fla. 1990), and Brown v. State, 565 So. 2d 304, 309 (Fla. 1990), wherein this Court held "domestic" style cases on the grounds of proportionality.

The instant case is also similar to Occhicone v. State, 570 So. 2d 902 (Fla. 1990), wherein the defendant killed his girlfriend's parents after previous threats had been made. In Occhicone, as in the instant case, the defendant was distraught that a female companion wished to leave a relationship. In Occhicone, the girlfriend broke off a wedding engagement while in the instant case the victim wished to break off her relationship with the defendant as well.

In his brief at page 43, appellant contends that he did not exhibit the intent to kill. As discussed above in this brief, this contention is totally refuted by the record. The contention that the infant child died merely because she was in her mother's arms is totally ridiculous when it is considered that appellant carefully took aim at Irma's son and would have also killed him, when he was not in his mother's arms, but for the fortuitous misfiring of the weapon.

Your appellee respectfully submits that this Honorable Court should find that the two death sentences imposed in the instant case are proportionate.

ISSUE V

WHETHER THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON AND FINDING THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR.

It is not alleged in appellant's brief, nor does it appear that the record indicates, that objection was made by the defense below as to the purportedly improper instruction on the prior violent felony aggravating factor. It is axiomatic beyond the need for citation that the failure to object to jury instruction precludes appellate review. On this basis alone, appellant's fifth point must fail.

Even if objection had been properly made and this claim could be considered on its merits, appellant's point must fail.[3] In Pardo v. State, 563 So. 2d 77 (Fla. 1990), the trial court had ruled that, in his opinion, the Florida legislature intended the aggravating factor for a prior conviction for a violent felony to apply to offenses other than the ones for which the defendant was presently tried. Id. at 80. In rejecting this position, the same position as now advanced by appellant sub judice, this Honorable Court held:

> This is not a correct statement of the law. We have consistently held that the contemporaneous conviction of a violent felony may qualify as an aggravating

[3] As discussed above, this Honorable Court previously determined that the prior violent felony aggravating factor was validly applied by the trial judge in this case. Santos v. State, 591 So. 2d 160 (Fla. 1991).

> circumstance so long as the two crimes involved multiple victims or separate episodes. Wasko v. State, 505 So. 2d 1314 (1987). (text at 80; emphasis supplied)

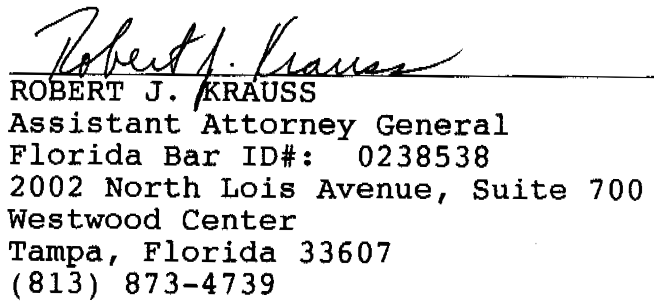
In the instant case, the appellant's murder of multiple victims rendered him susceptible to a finding of this aggravating circumstance. This Court has consistently applied the principle enunciated in Wasko. This Honorable Court should continue its consistent application of the multiple victim principle. In assessing the character of the defendant, it is essential to permit the consideration of all relevant factors, including the fact that multiple deaths occurred at the hand of the defendant. It would be totally illogical for a sentencer to able to consider that the defendant created a great risk of death to many persons, yet that same sentencer could not consider the fact that the defendant actually murdered multiple victims at the same time. Appellant's fifth point should be rejected.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Andrea Norgard, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 20th day of July, 1993.

OF COUNSEL FOR APPELLEE.